United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1290

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, an unincorporated association, and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, an unincorporated association,

Plaintiffs-Appellants,

vs.

LEE NATIONAL CORPORATION,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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NOTE

The following abbreviations are used herein:

"(R)"	Record on Appeal - not reproduced in Appendix
"(EX)"	Exhibit in Evidence - not reproduced in Appendix
"(EX [A])"	Exhibit in Evidence [denoting location in Appendix]
"(A)"	Transcript of Proceedings - reproduced in Appendix
"(CONWAY A)"	Example of testimony of a witness or the Court denoting location in Appendix
"(Opinion [A])"	Specified Opinion or Order of Lower Court [denoting location in Appendix]
"(R [A])"	Record on Appeal [denoting part reproduced in Appendix]
"(D.Br.)"	Reference to Defendant's Answering Brief
"(P.Br.)"	Reference to Plaintiff's Main Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, an unincorporated association, and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, an unincorporated association,	Docket No. 74-1290
Plaintiffs-Appellants,	
- against -	
LEE NATIONAL CORPORATION,	
Defendant-Appellee.	

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

POINT I

DEFENDANT'S BRIEF CONFUSES THE "ESSENTIAL THEORY" OF THIS CASE INTO MAKING IT A FRAUD ACTION.

Defendant's Brief refers to what Judge Mansfield called the essential theory of the Union's case. They cite the following statement from the Plaintiffs' Brief on the Summary Judgment Motion before Judge Mansfield (D.Br. p.48):

> "The essential theory of the plaintiffs' case is that the defendant company perpetrated a fraud upon the unions by unilaterally imposing conditions upon the union which forced a strike thus making it appear that the Company was shut down by unreasonable organized employees over simply economic issues . . . (R.44, p.2)

and say therefore that the Court below applied the proper burden of proof, implying that plaintiff itself was the first one making the error of calling this a fraud action.

This quotation does not go far enough. The very next sentence in the subject Brief states:

> ". . . Then, during the course of such strike the Company was able to terminate the Welfare Agreement two years before its ordinary termination date, but pursuant to procedures therein provided for such early termination." (Ibid)

> ". . . Further, the permanent discontinuance occurred on or before July 16, 1963 pursuant to a preconceived plan." (Id., p.3)

Put another way, the essential facts are that the Company effectively closed the plant on July 16, 1963 by locking out the employees (by the imposition of conditions it knew could not be accepted) without any intention of reopening and disguised the true nature of its acts by

deception and a charade of collective bargaining which it made sure could not reach agreement.

This does not make this case a fraud action. It is a breach of contract action.

The Company camouflaged what it was really doing in order to try to convince everyone that they did not unilaterally close down but instead were closed down by the intransigent Union. Plaintiff is suing on the same theory it would have asserted (breach of contract) if the Company h made an announcement it was closing down and failed to make the required payments. The fraud is in the cover-up and the Company's defense is a continuing fraud upon the Court. As noted in the Plaintiffs' main Brief (P.Br.pp.52, 54-55), Clairmont attempted to perpetrate this fraud on the Court below by insisting that he did not expect the Union to strike when he issued his Work Rules (EX.44[A1623]; CLAIRMONT A816,885) and the Court made it clear that it did not believe him (P.Br. p.52; C Court A1098, 1079, 1094, 1101, 1414).

That effort on the part of the Defendant still continues before this Court. Defendant still refuses to concede that the Work Rules were designed to force a

stoppage and still tries to paint them merely as revised proposals (D.Br. p.29):

> "The new work rules contained most of the major Company proposals "as amended to date during negotiations' . . .
>
> The Union thereupon advised the Company that the new work rules were unacceptable, that the day-to-day agreement was cancelled, and that it was going on strike . . . "

POINT II

PLAINTIFFS NEVER CLAIMED A CONSPIRACY ALTHOUGH DEFENDANT AND THE COURT BELOW MAY WELL HAVE ADOPTED A CONSPIRACY THEORY AS PART OF PLAINTIFFS' BURDEN OF PROOF.

The Defendant's Brief states:

> "Judge Knapp had previously identified Conway to plaintiffs' counsel as someone who 'would almost surely have had access to evidence of any conspiracy against plaintiffs that might have existed' . . ." (D.Br. p.10).

This is an example of how the Court below may have been proceeding on an erroneous theory and imposing a more difficult burden of proof upon Plaintiffs than was required. Just as this was not a fraud action (supra,

Point I), so it was not a conspiracy action. No conspiracy has been alleged and no conspiracy need be proved. A corporation does not conspire with itself. More importantly, as Judge Knapp noted, Clairmont was in effect the corporation (Court A1077-1079). He issued orders and he may or may not h ave taken others into his confidence. This was no more a conspiracy action than it was a fraud action. It was simply a breach of contract action.

POINT III

THE DEFENDANT'S BRIEF ITSELF ESTABLISHES BOTH THE HOPELESSNESS OF THE COMPANY CONTINUING AS A VIABLE BUSINESS AND THE RATIONALE AND MOTIVATION FOR CLOSING DOWN.

The Defendant sets forth a complete exposition of the hopelessness of the Company's position as a continuing entity which makes it apparent that the Company had nothing to sell except a plant and a trade name.

> "Lee's disappearing profitability . . . was . . . traceable to . . . delayed acceptance and production of the popular new two-ply tire; a sales distribution restricted almost exclusively to small, unprofitable, branch operations; absence of any serious effort to replace the loss of Lee's largest customer, Phillips

> Petroleum, whose business amounted to almost one-half of Lee's total production and who had informed the Company in 1958 that it would decrease its purchases from Lee in yearly stages until it was entirely phased out in 1963 . . ." (D.Br. p.13-14

What the Defendant fails to point out is that the Company's ratio of profitability to sales matched or exceeded its competition until the loss of sales from Phillips took effect coincidental with Clairmont's take-over. This is obvious from Defendant's own exhibit of Moody's Financial Reports. ** Profits were consistent with their competition despite its supposedly "supine labor policy" (D.Br. p.14, EX.139A[A1974]). ** This highlights the point in Plaintiffs' main Brief (P.Br. pp 7-9) that the Company was no longer in a viable condition because it had effectively lost its sales volume and had no real hope of recapturing its historical market position (EX.90A[A1802]).

POINT IV

THE DEFENDANT, AS WELL AS THE COURT BELOW, MISCONSTRUED THE PURPOSE AND SIGNIFICANCE OF THE EVIDENCE CONCERNING THE TREAD TUBER

** Set forth in chart form as Appendix A of this Reply Brief for ease of reference.

The Defendant's Brief describes what was supposed to be Plaintiffs' theory about the tread tuber and why it was offered into evidence by the Plaintiffs' namely, that leaving it uninstalled was evidence that the Company had already decided to go out of business and that not using it as a bargaining tool was evidence that the Company did not want to reach an agreement (D.Br. p.8 Fn.). That obscures the real value of this evidence.

The main effect of the evidence on the tread tuber was that it materially eroded the credibility of Clairmont as a witness. He was emphatic at the trial that the main problem of the Company was low productivity due primarily to a lazy work force. He further stated that the plant was in almost perfect shape; that its layout and equipment were at maximum efficiency. "We knew we had everything we needed . . . (CLAIRMONT A838)." The fact that such a major piece of equipment "the length of a football field" (HESS A995) was either missing or not installed goes to the heart of his statement that the plant was in perfect condition at the time of the take-over. This is particularly so since the tread tuber would have had a material effect on productivity and efficiency, as was clearly borne out by the testimony (HEINRICH A1007-1016).

Judge Knapp, after basing his first dismissal of the Complaint largely on this point (COURT A1079, 1086, 1120), finally reversed himself and agreed that the expenditure of some $200,000 by Clairmont towards the installation of this equipment was consistent with the possibility that Clairmont did not intend to remain in business but that the installation of such equipment would make the plant more saleable (COURT A 1402).

Whether or not the tread tuber would have had a material effect on the bargaining negotiations is academic since the Company's proposals were already deemed harsh enough by Conway so that the tread tuber would have had little effect. However, Conway asserted that had he been told of the status of the tread tuber, he certainly would have imparted it to the Union as a means of showing the good faith of the Company, thus re-establishing its credibility at a time when the Union was unsure of Clairmont's intentions to continue operations (CONWAY A1208-1209; COURT A1391).

POINT V

THE COMPANY MAKES MUCH OF THE SUPPOSED INCONSISTENCY OF THE UNION IN SOMETIMES CALLING THE WORK STOPPAGE A STRIKE AND SOMETIMES CALLING IT A LOCKOUT.

The Defendant's Brief makes much of the fact that sometimes the work stoppage was referred to as a strike and sometimes a lockout (D.Br. 29-40 fn.). There is no inconsistency here. A Union whose members are actually physically locked out are often said to be on strike. In this case the Union was forced by the Work Rules (EX.44[A1623]) to go out on strike. Furthermore, for purposes of the case at bar, Judge Knapp said that if he were required to make a finding on this issue, he would find that it was a lockout (COURT A1094, 1414).

POINT VI

THE REFUSAL OF THE NLRB TO ISSUE AN UNFAIR LABOR PRACTICE COMPLAINT IS IRRELEVANT TO THE ISSUES IN THIS CASE.

The Plaintiffs have never questioned the right of the Defendant to close-down its plant. The employees and the Union were obviously misled at the time of the strike or

lockout as to the true intentions of the Company. Therefore, the Union filed an unfair labor practice charge believing that the Company's position was in and of itself a refusal to bargain fairly. It is now clear, that on July 16, 1963, Clairmont intended to permanently close down all manufacturing operations but to make it appear that he was closed down by a strike until he could terminate the Welfare Agreement (EX.36[A1581]; EX.37 [A1607]) and thus not have to make the payments required by a termination of operations *

The Union never questioned the right of the Company to close down. Its discontinuance of operations was not an unfair labor practice but its failure to pay was a breach of contract.

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* In fact, Clairmont was so sensitive on this issue that he insisted on having Union Local 102 agree that the sale of the Youngstown plant and assignment of all labor agreements to Aeroquip "shall not be construed as a discontinuance of operations . . . within the meaning of . . . the Welfare Agreement . . . " (EX.3[A1541]; EX.6[A1545]; CLAIRMONT A942-944).

POINT VII

DEFENDANT INCORRECTLY STATES THAT THROUGHOUT THE STRIKE THE COMPANY KEEP ITS ENTIRE STAFF INTACT EXCEPT FOR LABOR.

The Defendant states that the Company kept its whole organization (except labor Union employees) intact throughout the strike (D.Br. p.33). However, the Court below found no evidence to support such claim (COURT A1115) and Conway testified to the discharge notices he was instructed to issue weekly after the lockout commenced which reduced the ranks of non-Union employees virtually to zero by the Winter of 1963. Only non-operational functions such as security and maintenance remained within a relatively short time following the work stoppage (CONWAY A1225-1227).

POINT VIII

DEFENDANT'S BRIEF IS IN ERROR WHEN IT SAYS THAT CLAIRMONT'S ACTS PROVE THAT HE INTENDED TO CINTINUE OPERATIONS.

The Defendant lists several acts of Clairmont as proof he intended to restore "... the Conshohocken plant to its former profitability ...", such as personally attend-

ing some meetings with the Union, offering an "open door" to look at the Company's records, assembling a new management team of Heinrich, Garrett and Barkett, approving the expenditure of some $200,000 to install the new tread tuber and installing a private telephone wire linking Clairmont's New York City office with Heinrich's at Conshohocken (D.Br. pp. 43).

Defendant's Brief concedes that the Company had lost about fifty percent of its entire sales volume and that the balance was mainly unprofitable by reason of the extreme high cost and inefficiency of the Company's marketing system which consisted of wholly-owned sales outlets (D.Br. pp.13-14). But, in the face of this drastic predicament, Clairmont never hired a sales manager to fill that vacant position in his management team. In fact, he did absolutely nothing in the way of creating or developing a sales organization.* How does one build up sales volume from almost a zero basis in a fiercely competitive market without a sales manager and an aggressive marketing program?

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* Furthermore, as part of his economy drive, he even eliminated advertising (Ex. 54A, p.4[A1694 at 1696]; CLAIRMONT A737,898).

As for the rest of the management team assembled by Clairmont, Heinrich was a trusted aide who had been closely associated with him in previous business ventures and was placed in charge of the daily operations at Conshohocken (HEINRICH A1032-1033; EX.54A, p.3[A1694 at 1695]). Garrett and Barkett were obviously operational people who were needed to help maintain the operation at that time. The answer very simply is that Clairmont needed an operational plant to sell, merge or otherwise dispose of, in order to capitalize on the Company's fundamental assets. This idea is hardly inconsistent with Plaintiffs' theory that in mid-1962, after making a thorough assessment of the Company's situation, Clairmont had determined upon several alternative courses of action, which, with the benefit of hind-sight, seem clear enough, as set forth in Plaintiff's main Brief (P. Br. pp 9-13).

To begin with, he attempted to renegotiate the Welfare Agreement to get co-termination of all Agreements in 1963, limit payments to a specific fund rather than as a general obligation of the Company, preclude special distribution payments and pension benefits in the event of a strike and eliminate liability of officers and directors for such payments.

Next, he made various attempts to obtain Union consent to waive or at least greatly minimize funding requirements under the pension program, resulting in his ultimate request in April, 1963 (EX.90A[A1802] for a permanent fifty percent reduction of or at least a full temporary waiver of vested pension rights. During this period, he continued operations while attempting to sell it as a going business* or merge it with another company which could take advantage of the production facilities and thereby supply the sales volume vitally needed for efficient production (EX.90A passim [1802-1813]; EX.40[A1612]).

Finally, when all else had failed, he aimed to shut down the business by eliminating the costly and vastly unused manufacturing arm, running out all existing sales agreements and doing so in such a manner as to try to avoid the substantial liabilities embodied in the Welfare Agreement, which is the subject of this litigation. Ultimately, he was able to sell the Conshohocken plant and the trade name of Lee Tires to Goodyear, which was able to capitalize on such assets.

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* This effort was successful for the Republic Rubber Division in Youngstown, which was sold to Aeroquip in October, 1963 but was unsuccessful as to the Lee Tire Division in Conshohocken (EX.61A[A1745]; EX.62A[A1746]).

Considering the allegedly horrendous results left over from the prior management's "supine labor policy", Clairmont's active steps taken to retain Conway in charge of labor relations flies directly in the fact of Defendant's contention, at least with respect to the new management team, and is a subject treated at great length in Plaintiff's main Brief (P.Br. pp. 56-57).

As stated above, and as noted by Judge Knapp at the final hearing below, the additional expenditure of some $200,000 to install the new tread tuber was quite consistent with a desire to make the plant more saleable rather than leave a woefully inefficient major piece of equipment on the factory floor (COURT A1402-1403).

Similarly, the installation of the private telephone line was merely a more economical convenience to Clairmont and Heinrich (HEINRICH A1021); since it was strictly a private line, it probably also was intended to keep secret all such communications between them.

Clairmont's personally attending several meetings with the Union could well have been required, considering that he was asking the Union to make major sacrifices in order to help the Company. Of course, it need hardly be added that

Clairmont's group stood to gain the most from any concessions by the Union (See EX.60A(1)-60A(9)[A1731-1742]).

POINT IX

DEFENDANT'S STATEMENT THAT THE CLAIRMONT GROUP'S STOCK PURCHASES AFTER ASSUMING CONTROL DID NOT SIGNIFICANTLY INCREASE ITS HOLDING, IS TOTALLY CONTRARY TO THE FACTS

Defendant's claim that Clairmont's group had not significantly increased their holdings after assuming control of the Company in May, 1962 (and, therefore, being in complete possession of all corporate data) is untrue (D.Br. p.46). Exhibits 60A and 60A(1)-60A(9) clearly show that the Clairmont group's holdings increased during that very period from about 140,000 shares to about 185,000 shares, an increase of approximately one-third. This can hardly be considered an insignificant increase.

Furthermore, one is compelled to query why Clairmont, an astute investor, would increase his holdings at all in a company* if he really was surprised at the condition in which

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* Furthermore, as noted in Plaintiff's main Brief (P.Br.pp.58-62) the timing of the major purchases was strangely coincidental with the timing of certain major announcements by the Company, first concerning the gloomy economic forecast of the Company issued in the Spring 1963 (EX.86A[A1792]; EX.108A[A1903]) and on the eve of the announcement of the sale of the Republic Rubber Division to Aeroquip in the Fall of 1963 (CLAIRMONT A945-954, EX.61A[A1745]; EX.62A[A1746]).

he found it, assuming it really was a lemon.

POINT X

DEFENDANT'S ATTEMPT TO MAKE IT APPEAR THAT THE UNION GRANTED TO OTHERS WHAT IT WOULD NOT GRANT TO CLAIRMONT IS NOT IN ACCORD WITH THE FACTS.

Defendant's Brief purports to show that the Union gave to the companies purchasing the plants at Conshohocken and Youngstown certain relief or advantages which they would not give to Clairmont (D.Br. p. 36). First, they state that Goodyear did not agree to buy the plant until its industrial engineers evaluated each job and established job loads and incentives as they had in their other plants; yet all those plants were organized and manned by various locals of the Union. Nowhere in this Record is there any evidence that Goodyear ever requested that the Union work under conditions such as those imposed by Clairmont (EX.44[A1623]). The Minutes of the bargaining sessions (EX.35A-43A[A1666-1688]) make it clear that the Union was agreeable to some sort of job evaluation program during the negotiations prior to the inception of the Work Rules.

With respect to the situation with Local 102 in Youngstown, Ohio and the sale of that operation to Aeroquip, Defendant's Brief incorrectly states that Aeroquip got from Local 102 a "Working Agreement which contained practically all the provisions which Clairmont had sought from Local 102 in the negotiations and which Local 102 had refused . . ." (D.Br. p Fn.). The contract with Aeroquip (EX.113A[A1903-14]; EX.112A [A1903-6]; EX.2-6[A1513-1545]) did not contain anything like the Work Rules imposed by Clairmont at Youngstown (EX.8A, 8A(1)-8A (6)[A1633-1642]; EX.111A[A1903-1]). Furthermore, Aeroquip took over all of the obligations of the defendant, including all vested Pension and Welfare liabilities, and entered into a new contract with the Union. There was no wage cut and there was nothing else onerous in the Agreements with Aeroquip (See Ex. 113A[A1903-14]).

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiffs' main Brief, the final order and judgment of the Court dismissing Plaintiffs' second cause of action should be

reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

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APPENDIX A

EXHIBIT 139A - CHART SHOWING COMPARISON OF SALES AND EARNINGS (LOSSES) OF DEFENDANT AND 3 SIMILARLY SITUATED COMPETITORS

S = Net Sales (000's omitted)
E/L = Earnings (Losses) (000's omitted)

Year		Lee Rubber & Tire Co.	Mansfield Tire & Rubber Co.	Cooper Tire & Rubber Co.	Mohawk Rubber Co.
1950	(S)	$39,267	$47,400	$13,274	$11,551
	(E/L)	2,914	2,525	575	596
1951	(S)	50,402	66,831	17,713	20,884
	(E/L)	2,185	2,107	329	1,072
1952	(S)	45,335	55,551	17,056	19,189
	(E/L)	1,767	1,330	322	683
1953	(S)	46,302	59,078	22,952	16,263
	(E/L)	1,674	927	359	413
1954	(S)	39,385	50,378	15,026	8,864
	(E/L)	1,400	890	125	d(646)
1955	(S)	45,912	74,555	23,627	14,330
	(E/L)	1,750	1,708	400	321
1956	(S)	46,581	61,557	23,757	15,126
	(E/L)	1,612	1,376	410	370
1957	(S)	48,601	59,722	24,473	20,842
	(E/L)	1,762	1,522	270	563
1958	(S)	46,558	63,634	31,042	25,513
	(E/L)	1,797	2,310	956	1,065
1959	(S)	52,164	68,950	37,710	31,656
	(E/L)	1,521	2,282	1,341	1,219
1960	(S)	44,298	61,958	36,021	32,326
	(E/L)	322	705	d(486)	1,067
1961	(S)	44,683	62,210	40,990	36,379
	(E/L)	279	869	1,139	1,751
1962	(S)	45,592	70,335	47,556	37,574
	(E/L)	d(840)	924	1,516	1,004
1963	(S)	25,813	74,246	49,508	37,678
	(E/L)	d(1,079)	971	1,640	1,280

Service of 2 copies of this within
Reply Brief is admitted this
7 day of December, 1974

ATTORNEY FOR Appellant-Appellee